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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 797

VERNON F. NEUBAUER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit.

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INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	8
Conclusion	12
Appendix:	
Opinion	13
Judgment	20

CITATIONS.

Cases:

Crawford v. United States, 212 U. S. 183	9
Frank v. United States, 10 Cir., 220 F. 2d 559	9
Glasser v. United States, 315 U. S. 60	11
Gordon v. United States, 344 U. S. 414	11
Kotteakos v. United States, 328 U. S. 750	11
Little v. United States, 10 Cir., 73 F. 2d 861	9
Love v. State, 16 Ala. App. 44, 75 So. 189	9
Morissette v. United States, 342 U. S. 246	9, 10
People v. Conte, 17 Ca.. App. 771, 122 P. 450	9
People v. Gaimari, 176 N. Y. 84, 68 N. E. 112	9
People v. Jersky, 377 Ill. 261, 36 N. E. 2d 347	9
People v. Lee, 248 Ill. 64, 93 N. E. 321	9
People v. West, 139 C. A. 2d Supp. 923, 293 P. 2d 166	9
State v. Wright, 352 Mo. 66, 175 S. W. 2d 866	9
United States v. Johnson, 319 U. S. 503	11
United States v. Lowe, 3 Cir., 234 F. 2d 919	11
Wallace v. United States, 162 U. S. 466	9
Weiler v. United States, 323 U. S. 606	10

IN THE

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No. .....

VERNON F. NEUBAUER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on January 21, 1958.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, pp. 13 to 19) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 21, 1958 (Appendix, infra, p. 20). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether in a mail fraud prosecution involving the mailing of a false financial statement to various banks, an accused, relying on the defense of good faith, may testify as to conversations had with an internal revenue agent and bank officials in order to buttress his testimony concerning his intent.

2. Whether in reviewing a criminal conviction, an appellate court in examining alleged errors in rulings on evidence and a motion for a mistrial must give to the government the benefit of every reasonable inference which can be drawn from the evidence viewed in the aspect most favorable to the government.

STATUTE INVOLVED.

18 U. S. C., § 1341, provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or

authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94."

STATEMENT.

Petitioner was convicted under two counts of a four count indictment which charged him and a certified public accountant with using the mails in furtherance of a scheme to defraud certain banks which had made loans to the Jefferson Loan Company, Inc., by means of a false financial statement showing that company to be in a sound and solvent financial condition as of July 31, 1951, and thereby leading the banks to believe that their outstanding loans to the loan company were safe and secured, and so believing, to refrain from demanding payment of their loans in violation of 18 U. S. C. A., § 1341. The trial judge set aside the jury guilty verdict against the certified public accountant and sustained a motion for judgment of acquittal on his behalf.

The government's evidence may be summarized as follows:

Petitioner was the president and actively in charge of the business of the Jefferson Loan Company, which consisted of loaning money, buying accounts receivables at discount, and borrowing money from banks to finance its operations (Tr. 97-98, 111-112). One Joe Mitchell was the owner of the stock of the Loan Company. He furnished

the original capital and employed petitioner, who had been in the finance business, as its president (Tr. 506). The money borrowed from the bank had his personal guarantee (Tr. 79-80, 89, 146, 171). There was testimony that a financial statement of the Loan Company of July 31, 1951, mailed to the banks mentioned in the indictment on December 22, 1951, was false and misleading in overstating the current assets of the company, and including as such assets, loans made by it to nine of its accounts which were worthless and uncollectible and which the jury found should have been charged off its books as bad debts (Tr. 432-443). The financial statement had been prepared by the accounting firm, headed by the accountant who was acquitted by the trial judge (Tr. 349-351, 364-365). The books of the Loan Company were kept by a bookkeeper under petitioner's supervision and had no fraudulent entries (Tr. 91, 126).

On January 4, 1952, petitioner assigned the assets of the Loan Company to a trustee for the benefit of the creditor banks (Tr. 37, 160) and the next day an officer of the creditor's banks became cognizant of the practice of the Loan Company to add on interest and extend existing loans in connection with its business (Tr. 143, 139-140, 159-160). Petitioner was not allowed to ask one officer of one of these banks whether he had told him that he was not interested in collecting the loans to the company (Tr. 147-149) and was not allowed to cross-examine another bank official as to whether the banks planned for tax purposes to deduct the loans as bad debts in an excess profits year and, therefore, did not call the loans (Tr. 174-175).

On March 11, 1952, petitioner in his capacity as president, signed and sworn to a tax court petition in its behalf involving the fiscal years ending January 31, 1950 and January 31, 1951, which stated in part that as a result of an examination by its credit banks it appears and

the Loan Company "avers that it has erroneously failed to charge off worthless and uncollectible loans and discount receivables . . . as bad debts, losses and expenses in computing" its taxable income for the years in question (Tr. 287-289). This document was prepared by a lawyer and by an accountant (Tr. 284).

On March 18, 1952, the Company was forced into receivership and a receiver was appointed who took charge (Tr. 25-26). The receiver attempted to liquidate the various accounts of the company, and collected virtually nothing of the nine accounts which the Government's evidence indicated were worthless (Tr. 38-45, 433-443).

Aside from character testimony, petitioner was the only defendant witness at the trial. He testified as to his background (Tr. 504-505), the history of the Loan Company (Tr. 505-507, 522), and its relationship with the creditor banks in establishment lines of credit (Tr. 508-519). He told of the circumstances under which the company had chosen its accountant (Tr. 524-526) and gave the history of each of the nine accounts claimed by the government to be worthless (Tr. 526-556, 563-580). He related that an attempt had been made to sell the stock of the Loan Company between October, 1951 and January, 1952, and that this transaction had been discussed with the credit banks (Tr. 556-559). Petitioner was not allowed to testify that some of the creditor banks followed the practice of merely adding-on interest in renewing the loans to the Jefferson Loan Company (Tr. 513-517). He was not allowed to testify that a bank official told him in January, 1952, that the banks did not care whether or not they collected their loans to the company (Tr. 559-563). He stated that he felt that every loan "when it was made was a good loan" (Tr. 581). In March, 1952, when the banks proposed to charge off a certain number of loans as bad debts, he protested to the lawyer prior to signing the tax court

petition "that those loans weren't bad debts and that I still considered them collectible" (Tr. 582).

But the jury was not allowed to consider part of petitioner's explanation as to why more loans were not charged off as bad debts (Tr. 585-586):

> "Q. Sir, I want to ask you with respect to the loans, can you tell His Honor and this jury why more loans had not been charged off as bad debts on July 31, 1951?
>
> A. Well, at that time, in fact, I guess the entire year of 1951, the federal government Internal Revenue Department had filed an assessment against the Jefferson Loan asking for more taxes, stating that we were setting up too high a reserve for bad debts, our reserves were too high.
>
> Mr. Boecker: I will submit the answer is not responsive.
>
> The Court: Objection sustained. He is talking about not setting up a bad reserve.
>
> Q. Can you tell me then, did the examination of the government have anything to do with the fact that you hadn't charged off more bad debts?
>
> Mr. Boecker: I will object on the part of the government; it is a conclusion on the part of the witness. It involves opinions as to what the government showed.
>
> The Court: Sustained.
>
> Mr. Hennelly: I offer that to show the state of mind at the time.
>
> Q. Did you feel at the time they were bad debts?
>
> A. Well, there is different definitions of bad debts. According to my definition, which is commonly accepted in the finance industry, I did not consider them bad debts."

The following offer of proof was made (Tr. 586-587):

> "Mr. Hennelly: I want to prove by this witness that the reason he did not charge off more loans as bad debts was for the reason that the income tax people had been investigating his books and that they had levied an investigation for his using too high a reserve for bad debts and he felt that if he charged off more bad debts he would get into additional trouble with the Internal Revenue Department.
>
> The Court: You understand when you go into a question of that kind, as I understand the law, the government requires you to charge a bad debt off in the year it became bad. You can't wait until one year and charge off bad debts for many bad debts of previous years that had been prior thereto that have become bad. A bad debt must be charged off in a specific year. Your question goes to why he did charge them all at one time. He may have been claiming to the government—the government may have admitted they were bad debts, but tried to charge them off, your offer will be reputed for that reason."

The Court below affirmed the conviction and held in regard to petitioner's attempt to prove what the Internal Revenue agents had asserted relative to the company having too high a reserve for bad debts as follows:

> "We fail to perceive the materiality or competency of that testimony. What the agents of the Internal Revenue Department may have thought about the company's reserve for bad debts, could not justify or excuse including bad debts, known to be bad, as current assets of the financial statement furnished the banks. Moreover Neubauer could not take the position that he considered the loans good and collectible, then

claim, in effect, that they were bad but had not been charged off because he thought the taxing authorities might object."

The Court in regard to the errors urged by petitioner which included these rulings on evidence, stated:

> "In considering thsse alleged errors, it is necessary to keep in mind that the burden of demonstrating both error and prejudice is upon the defendant . . ., and that this Court must give to the government the benefit of every reasonable inference which can be drawn from the evidence viewed in the aspect most favorable to the government."

REASONS FOR GRANTING THE WRIT.

1. The court below committed fundamental error in not allowing petitioner to tell his complete story in his defense It denied petitioner the right to testify as to conversations with a revenue agent relative to the charging off of debts whose collectibility was the basis of the false financial statement (Tr. 585-587). The refusal was based on the theory that petitioner by testifying that the loans were good precluded himself from testifying that the loans were bad and excusing the failure to charge them off because of a fear of the taxing authorities. The court, however, found an inconsistency where none existed by concluding that this view of defendant's testimony and offer of proof was the only interpretation possible even though the trial court's rejection of this testimony was based upon different grounds. Apparently, it viewed the evidence in the aspect most favorable to the Government. But it was more plausible to interpret the proffer to mean that one of the reasons that petitioner thought the loans collectible and properly in the company's current assets was that they could not be charged off as bad debts. Further, we know

of no case which adopts the novel view that an accused, as a witness, is precluded from contradicting himself at the trial. Generally, the government welcomes apparent inconsistencies.

The Court below found that good faith or intent was petitioner's only defense. It is settled that an accused may testify as to this intent. **Wallace v. United States,** 162 U. S. 466, 467; **Crawford v. United States,** 212 U. S. 183. And this mental element of a crime whether described as "intentional", "wilful", "knowing", "fraudulent", or "malicious", is a prime essential. **Morissette v. United States,** 342 U. S. 246, 274. Petitioner should have been allowed to buttress his statements that the loans were good "with testimony of relevant circumstances including conversations with third persons." **Frank v. United States,** 10 Cir., 220 F. 2d 559, 563-564. Any evidence which sheds light upon such a question so difficult of exact proof should be admissible. **Little v. United States,** 10 Cir., 73 F. 2d 861, 867. Certainly, a conversation with a revenue agent in 1951 as to the Loan Company's bad debt deduction would shed light on the subject of petitioner's good faith at the time of the mailings on December 22, 1951.

Moreover, it is generally held that inconsistent defenses may be employed in a criminal case. The fact that one defense is based on the theory that the accused did not commit the crime does not deprive him of the right to avail himself of other defenses based on the theory of justification or excuse. **People v. Gaimari,** 176 N. Y. 84, 68 N. E. 112; **People v. Lee,** 248 Ill. 64, 93 N. E. 321; **People v. Jersky,** 377 Ill. 261, 36 N. E. 2d 347; **People v. Conte,** 17 Cal. App. 771, 122 P. 450, 457; **People v. West,** 139 C. A. 2d Supp. 923, 293 P. 2d 166; **State v. Wright,** 352 Mo. 66, 175 S. W. 2d 866, 872; **Love v. State,** 16 Ala. App. 44, 75 So. 189.

In any event, intent is a jury issue and any inconsistency was a question of fact for the jury and was not a ques-

tion of law for an appellate court. **Morissette v. United States**, 342 U. S. 246, 274. It was not the function of the court below to determine guilt or innocence and it may not substitute its judgment for that of the jury. **Weiler v. United States**, 323 U. S. 606, 611.

The other reason advanced by the court below for rejecting this testimony is equally without merit. Indeed it is inconsistent with its other theory. If an inference could be drawn from this proffered testimony that petitioner thought the loan to be bad, that would be very material as petitioner's opinion as to the collectibility of the loans went to the very heart of the case. There is also no competency question involved. Extrajudicial statements by third persons to petitioner were admissible not to prove that the statements were true but as tending to show that they led him to believe, or fortified his belief, that the loans should not be charged off as incollectible.

Petitioner also should not have been precluded from testifying that some of the creditor banks had renewed their loans to the loan company by adding past due interest to principal (Tr. 513-517). One of the issues at the trial was whether the practice of the Jefferson Loan Company in renewing its loans by merely adding on interest was a circumstance indicating a fraudulent method to hide its true financial condition. Petitioner was trying to show that the creditor banks to whom the financial statement was mailed followed the same practice in renewing the loans to the Jefferson Loan Company as did the Loan Company with its accounts. Indeed the trial court in its charge in setting forth the position of petitioner at the trial stated that petitioner thought it was an acceptable practice to renew various lines of credit to debtors of the Loan Company and that the creditor banks were aware of this method of operation (Tr. 688-689). This excluded testimony that creditor banks also added on interest at the

loan due date showed that this practice was not in itself a signal that a loan was bad. Again, this proffer concerned the good faith and intent of petitioner.

2. The Court below in reviewing the errors urged, relating to the admission and exclusion of evidence and a motion for a mistrial, adopted an erroneous standard. It considered all errors by giving the government the benefit of "every reasonable inference which can be drawn from the evidence viewed in the aspect most favorable to the government." This is the rule applicable to the sufficiency of the evidence. **Glasser v. United States**, 315 U. S. 60, 80. But alleged error in admitting and excluding evidence should not be examined in this light. It is true that a trial court has discretion in regard to the reception of evidence. **United States v. Johnson**, 319 U. S. 503, 519-520. But the discretion given to the court "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing upon the trustworthiness of crucial testimony." **Gordon v. United States**, 344 U. S. 414, 423. It would not justify a restriction which keeps from the jury important facts bearing upon petitioner's intent. Nor should it justify refusing to admit evidence concerning the attitude of the creditor banks following the assignment for the benefit of creditors relative to collection of the various accounts of the Loan Company. The government had opened up this subject and the court below held that it was proper for the receiver to testify that he had collected virtually nothing from these accounts. When one side opens up a subject, it is but common fairness to allow the other party to meet the evidence offered. **United States v. Lowe**, 3 Cir., 234 F. 2d 919, 922. Moreover, these errors in the exclusion of evidence were of such a character that their natural effect was to prejudice petitioner's substantial rights and, therefore, the burden of sustaining the verdict rested upon the prosecution and not upon petitioner. **Kotteakos v. United States**, 328 U. S. 750.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,553.

Vernon F. Neubauer, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[January 21, 1958.]

Sidney M. Glazer (Mark M. Hennelly was with him on the brief) for Appellant.

Forrest Boecker, Assistant United States Attorney (Harry Richards, United States Attorney, was with him on the brief) for Appellee.

Before Sanborn and Van Oosterhout, Circuit Judges, and Weber, District Judge.

Sanborn, Circuit Judge.

This is an appeal by Vernon F. Neubauer from a judgment entered upon the verdict of a jury finding him guilty under counts one and three of a four-count indictment charging him and Marion F. Langenberg, under 18 U. S. C., § 1341, with having used the mails in furtherance of a scheme to defraud certain banks and banking institutions (hereafter referred to as "the banks") which had made loans to the Jefferson Loan Company, Inc., by means of a

false financial statement showing that company to be in a sound and solvent financial condition as of July 31, 1951, thereby leading the banks to believe that their outstanding loans to the Loan Company were safe and secure, and, so believing, to refrain from demanding payment of their loans.

The first count of the indictment charged that, in furtherance of their fraudulent scheme, the defendants on December 22, 1951, mailed a letter containing the false financial statement to E. T. Murray, Vice President, Mutual Bank and Trust Company, St. Louis, Missouri. The third count contained the same charge as the first count, except that the letter referred to was one sent to Fred Bissell, Vice President, American Trust Company, New York.

The indictment was returned on June 28, 1955. The trial commenced on February 27, 1956. The case was submitted to the jury March 2, 1956, after the court had denied separate motions of the defendants for a directed verdict of acquittal. The jury on the same day returned a verdict of guilty against both defendants upon counts 1 and 3, the only counts submitted to it by the court. The defendant Neubauer was sentenced by the court on March 9, 1956, to two years imprisonment under each of the two counts, the sentences to run concurrently. At the same time the court set aside the verdict of the jury as to Neubauer's codefendant, Langenberg, on the ground that the evidence was insufficient to sustain the verdict finding him guilty of participation in the scheme to defraud. Notice of appeal was filed by Neubauer March 16, 1956. The case was submitted to this Court November 21, 1957 (more than twenty months after the filing of the notice of appeal) upon the original files of the District Court and a typewritten transcript of the proceedings at the trial.

The alleged errors of the District Court upon which the defendant Neubauer relies for reversal relate to rulings

on evidence, the denial of a motion for a mistrial, and the denial of a motion for a directed verdict of acquittal.

In considering these alleged errors, it is necessary to keep in mind that the burden of demonstrating both error and prejudice is upon the defendant (**Hunt v. United States**, 8 Cir., 231 F. 2d 784, 788; **Palmer v. Hoffman**, 318 U. S. 109, 116), and that this Court must give to the Government the benefit of every reasonable inference which can be drawn from the evidence viewed in the aspect most favorable to the Government. **United States v. Manton**, 2 Cir., 107 F. 2d 834, 839; **Glasser v. United States**, 315 U. S. 60, 80.

The evidence shows that the defendant Neubauer was the President and actively in charge of the business of the Jefferson Loan Company, which consisted of loaning money, buying accounts receivable, and borrowing money from banks and banking institutions to finance its operations; that the financial statement of the Loan Company of July 31, 1951, furnished by mail to the banks referred to in the indictment was false and misleading in that it grossly overstated the current assets of the Company, and included, as such assets, loans made by it which were worthless and uncollectible and which should long since have been charged off its books as bad debts.

The record shows that, after the Company had been forced into receivership, the defendant Neubauer, in connection with a petition to the Tax Court, made an affidavit which contained the following statement with reference to the tax liability of the Company for the fiscal years ended January 31, 1950, and January 31, 1951:

> "Petitioner states that as a result of an examination made of the accounts and records of the petitioner by representatives of over ten banks to which petitioner is presently indebted on unpaid bank loans approximating $1,000,000.00, it appears and petitioner so avers that it has erroneously failed to charge off

worthless and uncollectable loans and discount receivables in the amount of about $959,000.00 as bad debts, losses and expenses in computing petitioner's taxable net income for the fiscal years here in question."

We conclude from an examination of the record on appeal that the question of the guilt or innocence of the defendant Neubauer was a question of fact for the jury, and that the trial court did not err in denying his motion for a directed verdict of acquittal.

Actually, the only defense that Neubauer had at the trial was that in furnishing the financial statement to the banks to which the Loan Company was indebted he had acted in good faith, with honest intent and in reliance upon his accountants, and that he did not know or believe that the worthless loans included as assets in the financial statement were uncollectible. He testified fully in his own behalf at the trial. His evidence covers 127 pages of the transcript. He stated: "I felt like every loan when it was made was a good loan"; and, "According to my definition, which is commonly accepted in the finance industry, I did not consider them bad debts." He also stated: "In March, of 1952, after the banks had taken physical control of Jefferson Loan Company" and proposed to charge off a certain number of loans as bad debts, he protested "that those loans weren't bad debts and that I still considered them collectable."

The position of the defendant Neubauer at the trial was fairly and accurately stated by the court in the charge to the jury as follows:

"Now, with respect to the position of the defendants, defendant Neubauer denies each and every one of the charges in the two counts of the indictment I am submitting to you and as I understand it, it is the position of the defendant he did not devise or intend to devise the scheme mentioned in the evidence; he did not knowingly make any false statement to the bank,

and he did not knowingly make any false statement reflecting the financial condition as of July 31, 1951; that he felt the loans had been placed in the proper category by his auditors and accountant and that the receiver, that is the person who took over the Jefferson Loan Company, was inexperienced and did not make a thorough attempt to collect the debts of the Jefferson Loan Company and that the banks relied upon Joe Mitchell's guarantee and so did the receiver; that Neubauer thought it was an acceptable practice to renew various lines of credit to the debtors of the Jefferson Loan Company; that defendant Neubauer felt that the banks were aware of this type of business and type of custom and the banks knew consumer credit was more risky than ordinary bank loans and therefore required Joe Mitchell's personal guarantee and that any error made in the preparation of the financial statement was made in good faith, since Neubauer had nothing to do with the bank's statement and relied upon a certified public accountant for that fact. Now, that is the position of the defendant Neubauer in this case."

The evidence shows that the Joe Mitchell referred to in the court's charge was a certified public accountant, the owner of the stock of the Loan Company, who furnished the original capital and employed the defendant Neubauer, who had been in the finance business, as its President.

The defendant contends that the court, by sustaining objections of the Government to certain questions put to him, erroneously and prejudicially limited his opportunity to show that in furnishing the financial statement to the banks he acted in good faith and without an intent to defraud.

Neubauer was not permitted to testify, over objection, that the reason that more of the loans made by the Loan

Company were not charged off as bad debts prior to the financial statement in suit, was that Internal Revenue authorities had asserted that too high a reserve for bad debts had been set up by the Company. We fail to perceive the materiality or competency of that testimony. What the agents of the Internal Revenue Department may have thought about the Company's reserve for bad debts, could not justify or excuse including bad debts, known to be bad, as current assets in the financial statement furnished the banks. Moreover, Neubauer could not take the position that he considered the loans good and collectible, and then claim, in effect, that they were bad but had not been charged off because he thought the taxing authorities might object.

The appellant contends that the court erred (1) in excluding his testimony that the creditor banks renewed their loans to the Loan Company by adding past due interest to principal; (2) in excluding his testimony that he was told by an officer of one of the banks that the banks did not care whether or not they collected their loans to the Company; (3) in not allowing the appellant to ask this officer, on cross-examination, whether he had told the appellant that he (the officer) was not interested in collecting the loans to the Company; and (4) in not allowing the appellant to cross-examine an officer of another creditor bank as to whether the reason the banks did not call their loans was that they planned, for tax purposes, to deduct the loans as bad debts in an excess profits year.

We find no merit in any of these contentions. The crucial issue in the case was whether or not Neubauer, in mailing the false financial statement in suit to the creditor banks, did so with fraudulent intent,—not whether the banks had added past due interest to principal in renewing the loans made to the Company, or whether they expected the Company to repay its loans, or what they expected to do for tax purposes if their loans were uncollectible.

Another contention of the appellant is that the receiver of the Loan Company should not have been permitted to testify, over objection, that little or nothing was collected from nine accounts of the Loan Company. The false financial statement which included these loans as assets was dated July 31, 1951. The receiver appointed by the court took charge of the Loan Company on March 18, 1952. Prior to his appointment, the Company had been in the hands of a trustee under an assignment for the benefit of creditors. The evidence showed that the receiver attempted to liquidate the various accounts of the Company, and succeeded in collecting virtually nothing on nine accounts which the Government's evidence indicated were worthless prior to the time the false financial statement was mailed to the creditor banks. The testimony of the receiver certainly tended to substantiate the Government's claim that the accounts in question were worthless and that the financial statement of July 31, 1951, was false, and to refute Neubauer's assertion that he believed them to be collectible on that date.

The appellant's contention that the court should have declared a mistrial because counsel for the Government at the trial had referred to certain invoices carried on the books of the Loan Company and reflected in the financial statement of July 31, 1951, as "bogus," and had failed to establish that they were "bogus," is overruled on the authority of **Dolan v. United States**, 8 Cir., 218 F. 2d 454, 460,—the court having instructed the jury to disregard the reference. It was one of those matters which reasonably could not be regarded as having affected the result of the trial. See **Glasser v. United States**, 315 U. S. 60, 83.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15553 September Term, 1957.

Tuesday, January 21, 1958.

Vernon F. Neubauer, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the original files from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Vernon F. Neubauer, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

January 21, 1958.

LIBRARY
SUPREME COURT, U. S.

No. 197

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FILED
MAR 20 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

VERNON F. NEISWAGEN, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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[illegible],
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	7
Conclusion	12

CITATIONS

Cases:

Busch v. *United States*, 52 F. 2d 79, certiorari denied *sub nom. Greible* v. *United States*, 284 U.S. 687	12
Johnson v. *United States*, 170 Fed. 581	8
Randle v. *United States*, 113 F. 2d 945, certiorari denied, 311 U.S. 683	7
Schindler v. *United States*, 208 F. 2d 289, certiorari denied, 347 U.S. 938	8
United States v. *Bookie*, 229 F. 2d 130	8
United States v. *Grayson*, 166 F. 2d 863	8
United States v. *Sylvanus*, 192 F. 2d 96, certiorari denied, 342 U.S. 943	12

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 797

VERNON F. NEUBAUER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13-19) is reported at 250 F. 2d 838.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1958 (Pet. App. 20). The petition for a writ of certiorari was filed on February 19, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court improperly limited petitioner's testimony.

2. Whether the trial court erred in excluding secondary evidence of a matter sought to be introduced when the best means of proving the alleged fact was available.

3. Whether the Court of Appeals erroneously applied the legal test for determining the sufficiency of evidence when considering alleged errors relating to the admissibility of evidence.

STATEMENT

On March 2, 1956, petitioner was convicted, in the United States District Court for the Eastern District of Missouri, under counts 1 and 3 of an indictment charging two violations of the mail fraud statute, 18 U.S.C. 1341 (R. 18). He was sentenced to two years imprisonment for each offense, the sentences to run concurrently (R. 19-A, 28).

1. Each count charged petitioner, as president of the Jefferson Loan Company, and one Marion F. Langenberg, a certified public accountant, with mailing false and fraudulent statements to a particular creditor bank of petitioner's Company in furtherance of a scheme designed to lead the banks to extend credit in the belief that the Company was solvent when in fact it was not (R. 1-5).[1] Evidence introduced at the trial showed the facts to be the following: Petitioner was actively in charge of the business of the Jefferson Loan Company, which lent money, bought accounts receivable at discount and borrowed money from banks

[1] The trial court set aside the verdict of guilty as to the certified public accountant on the ground that the evidence was insufficient to find him guilty of participation in the scheme to defraud (R. 29-30).

to finance its operations (Tr. 97-98, 111-112).[2] The financial statement in question which was furnished to the banks was false and misleading in that it grossly overstated the assets of the company, and included as assets loans made to nine accounts which were worthless and uncollectible and which long since should have been charged off its books as bad debts (Tr. 432-448). This financial statement was prepared from accounts kept under the direction of petitioner (Tr. 97-98, 103-106),) who had been in the finance business for a number of years. (Tr. 505).

There was evidence that petitioner, at the time the financial statement was prepared, was fully conversant with the status of these accounts. He gave directions to and had full reports from his subordinates who had been assigned to try to salvage something from them at times long prior to the issuance of the statement (Tr. 179-182, 189, 192-199, 203-209, 237-240, 327). The employee who made up the delinquency sheet reported directly to petitioner (Tr. 342). The evidence indicates that petitioner knew that some of his "current" receivables involved bankrupt concerns (Tr. 142-143, 162-163) and spurious invoices (Tr. 328-331, 436).

The record also shows that, after the company had been forced into receivership (Tr. 25-26, 37, 160), petitioner, in connection with a petition to the Tax Court, stated that as a result of an examination by over 10 creditor banks to which the Company was in debt for approximately $1,000,000.00, "it appears and petitioner so avers that it has erroneously failed to charge off worthless and uncollectable loans and discount receivables in the amount of about $959,000.00 as bad

[2] Volume II of the record before this Court, the transcript of trial proceedings, is separately paginated and will be referred to as "Tr.".

debts, losses and expenses in computing petitioner's taxable net income for the fiscal years here in question" (Tr. 287-289; Ex. 89).

The actual worthlessness of the nine "current receivable" accounts was further shown by evidence that they represented repeated renewals of accounts on which the interest had not been paid (Tr. 432-448). The practice of the company was to add the interest to the loan and extend it as a current account (Tr. 142-143, 159-162). When the receiver attempted to liquidate the accounts in question, he collected virtually nothing on them (Tr. 38-45, 433-443).

2. In connection with the practice of adding on interest in renewing loans, petitioner undertook to testify that the various banks which dealt with his company renewed their loans and added interest to the principal in the same manner as his company did (Tr. 512-517). Over objection that the books of the banks were the best evidence, he was permitted to testify, on his own knowledge, that this was the practice of the New York bank involved in count 3 (Tr. 511-512). Petitioner also testified that this was often the practice of the Stock Yards Bank involved in count 2 (not submitted to the jury) but an objection to his answer was sustained, the court stating that the books were the best evidence (Tr. 512-513). Petitioner's attorney then attempted to show, from a ledger sheet of the Mutual Bank involved in count 1, that that bank followed this practice, but the records did not so indicate and petitioner could recall "no case where it was done by the Mutual Bank" (Tr. 514-517).

3. Petitioner's defense at the trial was that in furnishing the financial statement to the banks he acted in good faith and in reliance upon his accountants. He

also testified that he felt that every loan "when it was made was a good loan" (Tr. 581). When the Tax Court petition was made, he protested to a lawyer "that those loans weren't bad debts and that I still considered them collectable" (Tr. 582). He then attempted the following explanation of why more loans by his Company were not charged off as bad debts prior to the financial statement (Tr. 585-587):

Q. Sir, I want to ask you with respect to the loans, can you tell his Honor and this jury why more loans had not been charged off as bad debts on July 31, 1951?

A. Well, at that very time, in fact, I guess the entire year of 1951, the federal government Internal Revenue Department had filed an assessment against the Jefferson Loan asking for more taxes, stating that we were setting up too high a reserve for bad debts, our reserves were too high.

Mr. BOECKER: I will submit the answer is not responsive.

The COURT: Objection sustained. He is talking about not setting up a bad reserve.

Q. Can you tell me then, did the examination of the government have anything to do with the fact that you hadn't charged off more bad debts?

Mr. BOECKER: I will object on the part of the government; it is a conclusion on the part of the witness and involves opinions as to what the government showed.

The COURT: Sustained.

Mr. HENNELLY: I offered that to show the state of mind at the time.

Q. Did you feel at the time they were bad debts?

A. Well, there is different definitions of bad debts. According to my definition, which is commonly accepted in the finance industry, I did not consider them bad debts.

Mr. HENNELLY: May I make an offer of proof on that?

The COURT: Yes, but don't make it broader than the question.

(OUT OF THE HEARING OF THE JURY:)

Mr. HENNELLY: I want to prove by this witness that the reason he did not charge off more loans as bad debts was for the reason that the income tax people had been investigating his books and that they had levied an investigation for his using too high a reserve for bad debts and he felt if he charged off more bad debts he would get into additional trouble with the Internal Revenue Department.

The COURT: You understand when you go into a question of that kind, as I understand the law, the government requires you to charge a bad debt off in the year it becomes bad. You can't wait until one year and charge off bad debts for many bad debts in previous years that had been prior thereto that have become bad. A bad debt must be charged off in a specific year. Your question goes to why he didn't charge them all at one time. He may have been claiming to the government—the government may have admitted they were bad debts, but trying to charge them off, your offer will be reputed for that reason.

ARGUMENT

1. Petitioner contends that he was erroneously denied the opportunity to testify that the reason the financial statement did not show greater charge-offs of loans was because the Internal Revenue Service told the Company it was setting up too high a reserve for bad debts (Pet. 8-10). The colloquy quoted in the Statement shows however that the ruling of the trial court was fully justified. Petitioner's offer of proof did not relate the statement by the Service to the loans under consideration. To develop the proof petitioner had in mind would have necessitated going into a consideration of whether the alleged objection depended upon the particular year in which a particular deduction was claimed and would have involved a complicated collateral line of proof which had no real relevancy. See *Randle* v. *United States*, 113 F. 2d 945, 951 (C.A. D.C.), certiorari denied, 311 U.S. 683.

As stated by the Court of Appeals (Pet. App. 18):

> * * * What the agents of the Internal Revenue Department may have thought about the Company's reserve for bad debts, could not justify or excuse including bad debts, known to be bad, as current assets in the financial statement furnished the banks.

Whether or not petitioner was motivated by fear of the Internal Revenue Service—a highly speculative theory at best—he nevertheless knowingly and intentionally intended to defraud the banks in submitting the false statement if he knew that accounts submitted as current assets were worthless. And, as appears from the Statement, the evidence justified the jury finding

that petitioner did, in fact, know they were worthless.[3]

Moreover, just prior to and at the same time that petitioner was seeking to introduce this testimony, which implied that he thought the loans were bad but that he did not charge them off because he was afraid of getting into trouble with the tax authorities, he was testifying that he did not charge them off because he did not consider them bad debts (Tr. 581-582, 585-587; *supra*, pp. 4-6). The latter declaration of bona fide intent was accepted by the court as petitioner's defense and the court properly refused, in the exercise of its discretion, to allow the record to be burdened with confusing and self-contradictory statements. *Schindler* v. *United States*, 208 F. 2d 289 (C.A. 9), certiorari denied, 347 U.S. 938; *Johnson* v. *United States*, 170 Fed. 581 (C.A. 1); cf. *United States* v. *Grayson*, 166 F. 2d 863, 867 (C.A. 2).[4]

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[3] Petitioner's assertion that the Court of Appeals usurped the function of the jury by determining what petitioner's intent was, thereby determining his guilt, is unfounded (Pet. 9-10). The Court of Appeals merely held that the evidence sought to be introduced was properly excluded because it did not meet the tests of admissibility. The cases cited by petitioner for the proposition that an accused may testify as to his intent, that inconsistent evidence of intent is a jury issue, and that inconsistent defenses may be employed in a criminal case (Pet. 9-10) presuppose the materiality and competency of the evidence sought to be introduced. *United States* v. *Bookie*, 229 F. 2d 130 (C.A. 7). Since the courts below found the proposed evidence incompetent as a matter of law under rules governing the admission of evidence, petitioner's cases are not in point.

[4] Petitioner's present assertion that "it was more plausible to interpret the proffer to mean that one of the reasons that petitioner thought the loans collectible and properly in the company's current assets was that they could not be charged off as bad debts" (Pet. 8) is untenable. There is no basis for concluding that petitioner considered the loans good debts because the Internal Revenue Service told him the Company reserve for bad debts was too high. The

2. Petitioner avers that the courts below erred in refusing to admit his testimony that some of the creditor banks allegedly renewed their loans to his Company by adding past due interest to the principal just as his Company renewed their loans to others. He claims that this evidence was material to show that the practice was an acceptable one of which the creditor banks were cognizant and therefore not indicative of a means by which his Company concealed from the banks its true financial condition (Pet. 10-11).

Petitioner was not prevented from introducing this evidence. He was permitted to testify that this was the practice of the New York bank involved in count 3 and he could not recall any case in which the practice was followed by the Mutual Bank involved in count 1. These were the only counts submitted to the jury. As to the practice of banks involved in counts 2 (Stock Yards Bank) and 4 (Manchester Bank), not submitted to the jury, the trial court would have allowed him to introduce the evidence if he could have done so by the best evidence available. The books of the bank were in court but petitioner attempted to testify on his own knowledge. The court sustained the objection to that line of testimony on the ground that the books of the bank were the best evidence, but petitioner either would or could not use the books to get the evidence in.

To the extent that the court did permit the testimony its ruling was more favorable to petitioner than was required. The testimony was irrelevant to the issues

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evidence indicates and the jury found that petitioner knew that the bad accounts reported as current assets were worthless. That the alleged warning by the Service could change his mind, or even enable him to use it as a basis for an opinion if he had no previous opinion, is incomprehensible.

in the case. Officials of the National Stock Yards Bank and the Manchester Bank testified that, after petitioner had assigned the assets of his Company to a trustee for the benefit of the creditor banks, they went over some Company books and discovered that the Company extended delinquent accounts by adding past due interest to the principal and carrying them as current assets. Some of these accounts related to bankrupt concerns and some of the cards noting extensions of credit were initialed by petitioner (Tr. 142-143, 162; *supra*, p. 3). The significance of this testimony was that the Company carried some large delinquent accounts as current assets, not that petitioner's Company perpetrated a fraud on its creditors by adding comparatively small amounts of uncollectible interest to the principal of a loan.

3. Petitioner's assertion that the Court of Appeals "in reviewing the errors urged, relating to the admission and exclusion of evidence and a motion for a mistrial, adopted an erroneous standard" is without merit. He contends that the court applied the rule for testing the sufficiency of the evidence, by giving the government the benefit of every reasonable inference which can be drawn from the evidence, when considering alleged errors relating to the admission and exclusion of evidence (Pet. 11).

The opinion of the Court of Appeals itself negates this assertion. Petitioner quotes part of the opinion out of context (Pet. 11). The entire relevant quotation is (Pet. App. 14-15a):

> The alleged errors of the District Court upon which the defendant Neubauer relies for reversal

relate to rulings on evidence, the denial of a motion for a mistrial, and the denial of a motion for a directed verdict of acquittal.

In considering these alleged errors, it is necessary to keep in mind that the burden of demonstrating both error and prejudice is upon the defendant (*Hunt* v. *United States,* 8 Cir., 231 F. 2d 784, 788; *Palmer* v. *Hoffman,* 318 U.S. 109, 116), and that this Court must give to the Government the benefit of every reasonable inference which can be drawn from the evidence viewed in the aspect most favorable to the Government. [Cases.]

In alleging below that the trial court erred in denying his motion for a directed verdict, petitioner attacked the sufficiency of the evidence. It is evident from the opinion that the Court of Appeals was alluding to this question in referring to the test under consideration. The Court of Appeals determined the questions relating to the admissibility of evidence separately and under other criteria.[5]

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[5] Although petitioner does not argue the point at length, he suggests that he was prejudiced (Pet. 4-5, 11) by the refusal of the trial court to let him cross-examine an official of the Manchester Bank as to whether the bank official had told petitioner he was not interested in collecting the loans to the Company (Tr. 147-149). Petitioner also made an unsuccessful attempt to testify as to this alleged fact himself (Tr. 559-563). Similarly, petitioner complains because he was not allowed to cross-examine an official of the National Stock Yards Bank as to whether payment was not demanded on their loans to the Company because the bank planned to deduct the loans as bad debts for tax purposes (Tr. 174-175). As the Court of Appeals said in disposing of these contentions below (Pet. App. 18):

"We find no merit in any of these contentions. The crucial issue in the case was whether or not Neubauer, in mailing the false financial statement in suit to the creditor banks, did so with fraudulent intent, not whether * * * they expected the Company to

We submit that the decision below is correct in every respect. The issues raised relate only to the particular case and are not matters of general applicability. There is no conflict of decision and no question warranting review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1958.

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repay its loans, or what they expected to do for tax purposes if their loans were uncollectible."

Even if the proffered evidence went so far as to show that the banks were not taken in by petitioner's pretenses, it is the law that the fraudulent scheme need not be successful in order for the perpetrator to be guilty under the mail fraud statute. *United States* v. *Sylvanus*, 192 F. 2d 96 (C.A. 7), certiorari denied, 342 U.S. 943; *Busch* v. *United States*, 52 F. 2d 79 (C.A. 8), certiorari denied *sub nom. Grieble* v. *United States*, 284 U.S. 687.

Moreover, petitioner was not convicted under the counts of the indictment which charged the mailing of the fraudulent financial statement to the Manchester and Stock Yards Banks. The court had withdrawn these counts from the consideration of the jury. Petitioner, therefore, should not be heard to complain of the exclusion of evidence relating to counts under which he was never convicted.

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